him in submitting the case under as clear an exposition of the law as the able judges who presided at the trial could have given, and to not a few the withdrawal of the case from the jury seemed to imply an apprehension that its submission might at least have resulted in a disagreement and the consequent labor and expense of a new trial. It is certain that no such consideration ought ever to influence the court, and in fact that no criminal case ought ever to be taken from the jury; because if there be any doubt about the facts in the case they ought certainly to pass upon them, and if there be no doubt they are certain to acquit.

On an examination of the criminal laws of the other States, so far as I have been able to make such examination, I find the general rule to be in this country as in England, that the State has no right of review by writ of error or appeal except as provided by statute, and no such right is secured in a large majority of the States.

The only States in which this right is secured are Arkansas, California, Indiana, Iowa, Kansas, Kentucky and Tennessee, while in all the other States such right of review is secured exclusively to the accused.

T. BURWELL.

NEW YORK.

RECENT AMERICAN DECISIONS.

Court of Appeals of New York.

COMMERCIAL BANK OF KENTUCKY *v.* VARNUM.

It is settled law in New York that a bill of exchange drawn in one State upon a person in another is a foreign bill.

At common law the rule is that presentment and demand of payment of a foreign bill must be made by the notary in person, but this rule may be varied by evidence of a usage universal in the place where the bill is payable for the clerk of the notary to make such presentment and demand.

The statute of New York (L. 1857, chap. 416), declaring that days of grace shall not attach to bills of exchange, etc., which are "on their face" payable in "days" after date, or on specified day, does not apply to bills made payable on their face in months after date.

A bill of exchange which is not entitled to grace, falling due on a public holiday, is payable on the day following.

The Commercial Bank of Kentucky sued Joseph B. Varnum, Jr., in the New York Supreme Court, for negligence in protesting a bill of exchange, while acting as a Notary Public.

The facts on which the suit was brought were as follows.

On September 4, 1860, William A. Barkesdale & Co., of St. Louis, Missouri, drew their bill of exchange, dated at that place, upon the Park Bank of the city of New York, for $10,000, payable in four months after date (acceptance waived), to the order of John F. Darby, by whom it was indorsed to the plaintiff. It was sent to the Metropolitan Bank in New York city,[1] and placed by that bank when due in the hands of the defendant, who was then a notary public, for the purpose of being presented, and, if necessary, protested by him.

The defendant gave the bill to his partner, Mr. P. W. Turney, who presented it for payment, which was refused, and on the same day an entry was made in the defendant's protest book under the joint supervision of the defendant and of Mr. Turney, stating that the bill was presented and protested *by the defendant;* Mr. Turney's name not being mentioned. This was signed by the defendant, while Mr. Turney put his initials opposite. The defendant forthwith made out a formal protest, reciting that *he* had presented the bill. In point of fact, he never did present it. He forthwith sent the usual notices of protest.

The drawers of the bill had become utterly insolvent. The indorser was perfectly solvent. He resisted the efforts of the plaintiff to collect the bill, upon the ground that there had been no valid protest; and the courts of Missouri decided in his favor. See *Commercial Bank of Kentucky* v. *Barkesdale*, 36 Missouri, 563.

While that suit was pending, and about two years after Mr. Varnum's protest, Mr. Turney made out a formal protest of

[1] Four months from Sept. 4th, 1860, would be Jan. 4th, 1861. But that day was set apart by the President of the United States as a day of public fasting and prayer, and by the laws of New York (Laws 1849, ch. 261), such fast days are observed as Sundays. Demand was accordingly made Jan. 5th, 1861.

the bill in his own name, and this was used in evidence against Mr. Darby, but without effect.

The defendant gave evidence tending to show a usage or custom among notaries and bankers in the city of New York, to treat bills like the one in question as *inland* bills, and to make and receive protests of such bills, signed by the notary, when presentation was, in fact, made by his clerk. This evidence, being received under exception, was finally stricken out as incompetent.

The court below gave judgment for the plaintiff in the full amount claimed; and the defendant appealed to the general term. See the opinion there and also the opinion of the judge at the trial reported in 3 Lansing 86. The judgment being there affirmed, the defendant brought this appeal.

Noah Davis, for appellant.

T. G. Shearman, for respondent.

I. The bill was a *foreign* bill of exchange. *Buckner* v. *Finley*, 2 Peters 586; *Dickins* v. *Beal*, 10 Peters 572, 579; *Bank of U. S.* v. *Daniel*, 12 Peters 32, 54; *Phœnix Bank* v. *Hussey*, 12 Pick. 483; *Chenowith* v. *Chamberlin*, 6 B. Monr. 60; *Rice* v. *Hogan*, 8 Dana, 133, 134; *Green* v. *Jackson*, 15 Maine 136; *Freeman's Bank* v. *Perkins*, 18 Maine 292; *State Bank* v. *Hayes*, 3 Ind. 400; *Aborn* v. *Bosworth*, 1 R. I. 401; *Commercial Bank* v. *Barkesdale*, 36 Mo. 563; *Bank of Cape Fear* v. *Stinemetz*, 1 Hill [S. C.], 44; 3 Kent Com. 63. *Halliday* v. *McDougal*, 22 Wend. 264, 272; *Carter* v. *Burley*, 9 N. H. 558, 566; *Brown* v. *Ferguson*, 4 Leigh 37, 51.

II. The bill in question being a foreign bill, the defendant in undertaking as a notary to present and protest it, undertook an official act in his capacity as such notary. *Townsley* v. *Sumrall*, 2 Peters, 170; *Bryden* v. *Taylor*, 2 Harr. & J., 963; *Chanoine* v. *Fowler*, 3 Wend. 173; *Gale* v. *Walsh*, 5 T. R., 239; *Phœnix Bank* v. *Hussey*, 12 Pick. 483; *Commercial Bank* v. *Barkesdale*, 36 Mo., 563; *Union Bank* v. *Hyde*, 6 Wheat. 572.

III. The defendant, having undertaken to act in his official capacity, could not delegate his powers to any other person. Story on Agency, § 14; *Ess* v. *Truscott*, 2 Mees & W. 385;

Powell v. *Tuttle*, 3 N. Y., 396, 407; *Newton* v. *Bronson*, 13 N. Y., 587, 593.

This rule is peculiarly applicable to the case of a notary. He is intrusted with special powers, which he is sworn to discharge faithfully. His certificate is consequently accepted over all the world as evidence of the due presentation of a bill of exchange.

It has been repeatedly adjudged that a notary must *personally* present a bill which he intends to protest, that he cannot delegate his authority to a clerk or agent, and that a protest made after presentment by a clerk only is utterly void. *Onondaga Bank* v. *Bates* 3 Hill, 53; *Hunt* v. *Maybee*, 7 N. Y. 266; *Chenowith* v. *Chamberlin*, 6 B. Monr. 60; *Carmichael* v. *Bank of Penna.*, 4 How. (Miss.) 567; *Sacrider* v. *Brown* 3 McLean 481; *Commercial Bank* v. *Barksdale* 36 Mo. 563; *Cubbs* v. *Adams*, 13 Gray 397; *Warnick* v. *Crane*, 4 Denio 460.[1]

There is not a single decision to the contrary, unless we except *Nelson* v. *Fotterall*, 7 Leigh 179, in which one of the judges expressed the opinion that a clerk regularly employed by the notary might present bills for him. But another judge expressed an opposite opinion, and it is clear that the court, as such, did not pass upon the question. We have examined all the other cases cited by the defendant's counsel on this point, and find that, without exception, the instruments upon which the controversy arose were *inland* bills or promissory notes, which might, of course, be presented by any one, and these cases have therefore no bearing upon the present controversy.

IV. Evidence of a custom among notaries in New York city to make demand of payment of foreign bills by their clerks was inadmissible, as such a custom, if it existed, would be void, as contrary to law. It is well settled that a custom directly opposed to the law is void. And by this it is not meant simply that it is

[1]The New York cases here cited were decided under the statute of 1833, which made a notary's protest of an inland bill evidence to the same extent as in the case of a foreign bill.

The other cases all turned upon the validity of the protest of *foreign* bills, and are direct authorities upon the precise point involved in this cause.

void if criminal, or if established for the purpose of evading the law, or if contrary to a statute. The whole mercantile law is founded upon custom; but when a custom is once so well established as to be judicially recognized, it becomes law, and cannot be changed by the introduction of a new custom. *Allen* v. *Merchants' Bank*, 15 Wend. 482; *Edie* v. *East India Co.*, 2 Burr. 1216.

A signal instance of the strict application of this principle may be found in the attempt which has been twice made to dispense with days of grace by proof of usage. The allowance of these days is based purely upon a mercantile custom, in direct contradiction of the written contract. Yet, this custom having been judicially established, the courts have absolutely refused to receive evidence of a new mercantile custom in opposition to it. *Woodruff* v. *Merchants' Bank*, 25 Wend. 673; 6 Hill 174; *Bowen* v. *Newell*, 8 N. Y., 190.[1]

Evidence of custom has been excluded in all other similar cases, where it was sought thereby to vary a fixed rule of law. *United States* v. *Buchanan*, 8 How. [U. S.] 83, 102; *Beirne* v. *Dord*, 5 N. Y. 102; *Otsego Bank* v. *Warren*, 18 Barb. 290;[2] *Suydam* v. *Clark*, 2 Sand. 133; *Brown* v. *Jackson*, 2 Wash. C. C., 24; *Coxe* v. *Heislay*, 19 Penn. St. 243.

The opinion of the court was delivered by

PECKHAM J.—It is insisted by defendant's counsel that the presentment and demand of payment of the draft were properly made by the clerk of the defendant, the notary. This was a foreign bill of exchange, being drawn in the State of Kentucky, upon a bank in the city of New York. This has been long settled by authority. *Dickins* v. *Beal*, 10 Peters 572; *Bank of U. S.* v. *Daniel*, 12 Peters 32; *Phœnix Bank*

[1] On a second trial of this cause the plaintiff proved the existence of a statute in Connecticut (the law of which governed the contract) which expressly prescribed that the allowance of days of grace should be regulated by usage. On this evidence he was allowed to prove the usage of *all the banks in the State* (*Bowen* v. *Newell* 2 Duer, 584; affirmed, 13 N. Y., 290). The stringent rule thus laid down only strengthens our position.

[2] In the Otsego Bank case it was expressly held that a usage among notaries 'cannot be allowed to control the rules of law in respect to commercial paper, nor make that a valid demand which the law declare not to be valid" (18 Barb., 295).

v. *Hussey*, 12 Pick. 483; *Buckner* v. *Finley*, 2 Peters 586; *Halliday* v. *McDougal*, 20 Wend. 81; S. C. 22 Id. 264.

It being a foreign bill, a protest was indispensable to a recovery against the indorser. *Holliday* v. *McDougal*, supra and cases there cited. *Dennistown* v. *Stewart*, 17 How. U. S. 606; *Phœnix Bank* v. *Hussey*, 12 Pick. 483; 3 Kent. Com. 2d. Ed. 93 and note.

Has then a notary's clerk any authority to make the presentment and demand of payment of a foreign bill?

This presentment and demand for the purposes of protest are practically of no moment to any one, as bills are always dishonored before they are handed to a notary to protest.

They have always been first presented and payment refused, and are then delivered over for protest, Chitty on Bills, 13 Ed. 457. The only practical benefit to any one is the notice of the dishonor to the prior parties to the bill, to enable them to protect themselves. It may possibly at some time be of some importance as evidence of the dishonor. Whether practically beneficial or not however, as the law requires it, it must be done.

Considering the rule at common law to be, in the absence of any custom or usage on the subject that the presentment and demand must be made by the notary in person, was the testimony offered of the universal usage in the city of New York for the clerk of the notary to make such presentment and demand admissible?

It may be remarked that the usage of merchants has established the great body of the law in reference to bills of exchange.

It gave grace to such bills and thus changed the contract.

It has thus settled the particular time of demand by the notary. The rule of law that required a protest of a foreign bill is wholly founded upon the custom of merchants. *Dennistown* v. *Stewart*, 17 How. 606.

In the absence of any established rule of law in this State by decision of the courts, or by any statute requiring a demand to be made by a notary in person, it is not perceived why a usage such as was offered was not admissible as proof upon the subject. This was the view of the learned justice

who tried this case, but he was of opinion that the law had been otherwise settled in this State. In this I think he was clearly in error. All the decisions referred to by him or upon the argument at bar were confined to the admissibility of certificates of protest and notice of bills and notes under the statute of 1833. (*Laws of* 1833, 394 Chap. 271). That statute made no provision as to what constituted a protest, but provided simply what the notary's certificate should *prima facie* prove, and had no reference whatever to the admissibility of this offered evidence, or to the duties of notaries at common law, in protesting a foreign bill—such as *Onondaga County Bank* v. *Bates*, 3 Hill 53; *Cole* v. *Jessup*, 9 Barb. 395; affirmed in Ct. of App., 10 N. Y. 96; *Warwick* v. *Crane*, 4 Den. 460; *Hunt* v. *Maybee*, 7 N. Y. 266; *Gawtry* v. *Doane*, 48 Barb. 148.

The counsel for the plaintiff to sustain the exclusion of this evidence refers to *Chenowith* v. *Chamberlin*, 6 B. Monroe 60; *Sacrider* v. *Brown*, 3 McLean 481; *Commercial Bank.* v. *Barkesdale*, 36 Mo., 563 at p. 573; *Cribbs* v. *Adams*, 13 Gray 597; *Carmichael* v. *Bank of Penna.*, 4 How. (Miss.) 567, Neither case sustains his position; on the contrary each one that speaks upon this point concedes the admissibility of the evidence and its controlling effect. The last case makes no allusion to the point.

The practice in England is to present and demand by a clerk of the notary, and we are not referred to an English authority holding such presentment illegal when the usage so to present was established.

Chitty on Bills, in his last edition (10 Eng. Ed. p. 355 note 4) sustains this usage and says it is not questioned in any English case, and "is amply justified by the law of principal and agent." I take this from 1 Parsons on Bills, 360, as this edition of Chitty is not accessible to me. This is said after correspondence upon examination and discussion of the subject, and is free from the doubt in older editions, based chiefly upon a doctrine of Mr. Justice BULLER in *Leftly* v. *Mills*, 4 T. R. 170–175, an action on an inland bill.

In Brooks' Notary of England, 3 Ed. 71, published in 1867, it is stated: "Before the protest is made, it is the custom in

England to cause the bill to be presented either by a notary or by his clerk (in general his clerk presents it) and acceptance to be demanded." As to the admission of usage see *Nelson* v. *Fotteral*, 7 Leigh 179; *Wittenberger* v. *Spalding*, 33 Mo. 421; *Commercial Bank of Kentucky* v. *Barkesdale*, 36 Mo. 573.

It is said that this usage was not known to the plaintiff, and hence could not be obligatory upon it. As knowledge by the plaintiff of this usage was not necessary to its validity, the mode of making presentment and demand was of no sort of moment to the plaintiff. That mode could not have influenced the plaintiff's action. What the law requires as to a foreign bill is a protest, and all that the owner is interested in is that the protest should be legal.

In my judgment the evidence offered was competent and should have been received. It is suggested that this usage was not admissible, as it was not set up in the answer. The rejection was not put upon that ground, but upon the broad merits. The question of pleading therefore is not considered, if there be anything in it, though I confess I do not perceive anything.

It is also urged that this bill was given to the defendant to present on the wrong day. That there was grace upon the bill, and hence it was due on the 4th and 7th of January, and not on the 5th, the day of its delivery for protest. It is probably a sufficient answer to this to say that no such point was raised at the trial; but as a new trial must be had on the other ground, my brethren think an opinion should be expressed on this point, as it has been fully discussed and will necessarily arise in the case.

The Act under which the plaintiff claims that grace was abolished, as to this bill, reads as follows:

"All checks, bills of exchange or drafts appearing on their face to have been drawn upon any bank or upon any banking association or individual bankers carrying on the banking business, etc., which are on their face payable on any specified day or in any number of days after the date or sight thereof, shall be deemed due and payable on the day mentioned for

the payment of the same without any days of grace being allowed," etc. (*Laws of* 1857, 838, *Chap.* 416, 52).

Observe—the bills must not only be payable on a "specified day" or on so many "days after date or sight," but they must "on their face" be so payable.

This language is plain and peculiarly specific. It was obviously designed to be so. Clearly it intended to abolish grace as to some bills, and not as to others. We must look at its language to learn precisely upon what bills grace was intended to be abolished.

It does not in terms include bills payable in *months* or in years after date—but it is said that such bills by calculation can be converted from *months* or *years* into days—and thus they are included. But this mode abolishes the words "on their face" so payable. These words are thus rendered superfluous and without meaning.

This violates a primary rule of construction; a bill payable in two years from its date, is not payable "on its face" in so many days from its date.

Thus it follows from the language of the Act that bills payable "on their face" in so many months or years from date are not payable "on their face" in so many days from date.

The language of the Act is particular and exclusive. What right has a court to make it general and inclusive? I think the purpose of the Act is in harmony with its language. It was intended, I think, to abolish grace upon short-time bills drawn upon banks or bankers. Thus the abolition is specifically confined to bills drawn payable "on their face" "in days," or on a "specified day," which are usually short bills. When the bill says pay on such a day, or one day after sight, it did not mean three days thereafter. But the holder should get his money upon such bills at the day specified.

The construction claimed by the plaintiff would abolish grace upon all time bills on banks or bankers—which was never intended, or it would have been easily expressed. It is also a rule that statutes in derogation of the common law are to be strictly construed. *Bussing* v. *Bushnell*, 6 Hill 382. *Rue* v. *Alter*, 5 Den. 119. Though I place but little

emphasis upon the rule for this construction. The case of *Leftly* v. *Mills*, 4 T. R. 170, throws light upon this question. The Act there provided for a protest of bills, etc., payable in days "after date," but the bill was payable "fourteen days after sight," and the court held that the statute did not "attach" to such a bill.

In my judgment the statute of 1857 does not attach to this bill. It follows that it was not due until the 7th of January. It was therefore delivered for protest upon the wrong day. In such case I think the bank committed the error in delivering the bill on the wrong day for protest, and it is liable therefore to the plaintiff. *Am. Exp. Co.*, v *Haine*, 1 Ind. 4.

The notary was directed by the bank to protest the bill. It virtually decided that there was no grace thereon. The notary is not presumed to be a lawyer who is to revise or reverse the decision of his employer as to the character of the bill and whether it is entitled to grace or not.

The bills and notes (fifty-two in all), delivered on this day to the defendant as notary, were delivered for protest, not for advice from him as a lawyer. Doubtless the action of the bank misled him.

If the bill was not entitled to grace it was no doubt protested at the right time, as it is held that such bills are due upon the day following, not the day preceding a public holiday. *Salter* v. *Burs*, 20 Wend. 205; *Avery* v. *Stewart*, 2 Conn. 69.

There are other questions, but as these will dispose of the case, it is not important to discuss them.

ALLEN, FOLGER and RAPALLO, J J., concurred. GROVER J and CHURCH, CH. J., agreed as to the first ground.

Judgment reversed; new trial granted; costs to abide the event.

When this case was tried, the defendant set up that he was not liable, on the ground that he was the agent only of the Metropolitan Bank, and owed a duty to them alone; that he was under no contract with and owed no duty to the plaintiff, and was not responsible to it for neglect to properly protest the bill. In support of this he relied on the rule, that a sub-agent is only responsible to the person from whom he received his appointment; that he is the agent of the agent and not the agent of the principal.

Plaintiff's counsel conceded the general rule to be as stated, but insisted

that it had no application to the case of a sub-agent who was a public officer, whom the agent was compelled to employ; and that the rule only applied to the cases of sub-agents, over whom and whose appointment and removal the agent had control.

The court discussed the subject at length and reviewed the cases of *Allen* v. *Merchants' Bank*, 33 Wend. 215; *Smedes* v. *Bank of Utica*, 20 *Johns.* 383 S. C. in Ct. of Errors, 3 *Cow.* 673; *Wilson* v. *Smith*, 3 How. U. S. 763; *Baker* v. *Prentice*, 6 Mass. 430; *Bank of Metropolis* v. *New England Bank*, 1 How. U. S. 234; *Lawrence* v. *Stonington Bank*, 6 Cow. 531; *Rancy* v. *Weed*, 3 Sandf. 584. Upon the review of all the cases the court was of opinion that at common law the notary in this case was not liable to the plaintiff, and that the decision in the Court of Errors in *Allen* v. *Merchant's Bank*, 22 Wend. 215, was conclusive against the plaintiff.

That case was an action brought to recover damages, resulting from the neglect of a notary, to whom a bank in Philadelphia had delivered a note transmitted to it by the defendant for collection, to notify the indorsers, whereby the debt was lost. The Supreme Court held that the defendant discharged its duty to the plaintiff when it delivered the notes to its corresponding bank in Philadelphia, and that the notary and not the defendant was liable for neglect, 15 Wend. 584. The Court of Errors reversed the judgment, holding that an agent receiving a note or bill for collection is liable to the owner for the laches of the agents employed by it in effecting the collection or protest of the bill or note, and giving notice to the parties liable, in the event of non-payment.

The court, however, was of opinion that the defendant in this case was liable to plaintiff under the New York statutes (3 R. S. 5 Ed. 474 § 37), by which it is provided that for any misconduct in any of the cases where notaries public appointed by the authority of the State authorities to act, either by the laws of this State, or any other State, or country, by the laws of nations or commercial usage, they shall be liable to the parties injured thereby for all damages sustained. It will be observed, therefore, that as far as this case decides on the liability to the principal of a sub-agent who is a public officer, it is against the liability of such sub-agent, as the ground on which plaintiff had judgment at the trial and the general term was that defendant was liable under the statutes.

As to the evidence offered on the trial to prove a custom among notaries in the city of New York, that presentment of bills and notes was made by their clerks, if it be conceded that at common law the rule is settled that a notary must present in person the decision of the Court of Appeals does not seem satisfactory.

In *Edie* v. *East India Company*, 2 Burr. 2216 (1716), evidence of a custom among merchants, whereby when the indorsement of a bill of exchange omitted the words "or order" the indorsement was held to be restrictive, was rejected on the ground that the contrary had been held by the court, and Lord MANSFIELD said that the question had been settled by the K. B. and the Common Pleas, and therefore witnesses ought not to be examined as to the usage after such a solemn determination of what was the law. In *Allen* v. *Merchants' Bank*, 15 Wend. 482, NELSON J., says, that after a rule made by custom has been recognized as law, it is no longer under the control of mercantile usage, and the adjudication is the proper evidence of it. It then becomes fixed and unalterable, except by legislative authority. In *Hinton* v. *Locke*, 5 Hill 437, BRONSON J., says that

no usage or custom can be set up for the purpose of controlling the rules of law. To the same effect see *Thompson* v. *Ashton*, 14 Johns 316; *Bevine* v. *Dord*, 5 N. Y. 95; *Wheeler* v. *Newbold*, 15 N. Y. 393; *Higgins* v. *Moore*, 34 N. Y. 417; *Duguid* v. *Edwards*, 50 Barb. 288.

As to how well settled in New York is the rule at common law, that a notary must *personally* present a bill which he intends to protest, it was held in *Onondaga Bank* v. *Bates*, 3 Hill 53, that a certificate of a notary that he *caused* a note to be presented at maturity was not sufficient evidence of a demand, the court construing the certificate to mean that presentment had not been made by the notary in person. And NELSON, J., declared his opinion that present ment by a clerk was not authorized by law. This decision was approved in *Hunt* v. *Maybee*, 7 N. York, 266. To the same effect is *Warnick* v. *Crane*, 4 Den. 460. These cases were decided under the statute of New York of 1853, which made a notary's protest of an inland bill evidence to the same extent as in the case of a foreign bill. These cases may not, therefore, be directly in point, but it is to be observed that the court, in giving the opinion above, concede the ground that at common law a no tary must present in person, and therefore this point becomes immaterial as upholding the decision.

H. G. A.

Supreme Court of the United States.

SEMMES, ADMINISTRATOR OF LUCKETT, *v.* CITY FIRE INS CO. OF HARTFORD.

A policy of insurance provided that no suit or claim thereon should be sustainable unless made within twelve months after the loss; and that in any such suit commenced twelve months after the loss the lapse of time should be conclusive evidence against the validity of the claim. A loss occurred and the insured was prevented by the war from bringing suit within twelve months. *Held*, that the war having rendered compliance impossible, the presumption from the lapse of time was thereby destroyed and did not revive by the cessation of the war; and the insured might recover if his action was brought within the period of the statute of limitations.

The period of the statute of limitations is to be computed by excluding the time of the war.

ERROR to the Circuit Court of the United States for the District of Connecticut. The opinion of the Circuit Court is reported in 8 Am. Law Reg., N. S. 673.

The opinion of the court was delivered by

MILLER, J.—This is an action on a policy of insurance, commenced on the 21st day of October, 1866, in the Circuit Court of the United States for the District of Connecticut, for a loss which occurred on the 5th day of January, 1860.

The only plea of the defendant is that the action was not